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No. 10-958

Supreme Court, U.S
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IN THE

Supreme Court of the United States

CELANESE CORPORATION,
Petitioner,

v.

MARTIN K. EBY CONSTR. CO., INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The last question put to Eby by the court of appeals at oral argument was whether Eby would have been liable as an arranger if it had known that its backhoe hit the Celanese pipeline. The answer was no. Its response to the petition clearly suggests that it agrees with the Fifth Circuit that a party must "desire" to cause environmental contamination in order to be an arranger. Br. at 11.

This specific intent requirement effectively guts arranger liability. Under it, Eby could have known that its backhoe hit the pipeline; known that the damage would inevitably cause a leak; deliberately

decided not to report the damage; and yet still escape arranger liability. Congress intended CERCLA to impose liability on those who cause pollution. It could not have intended to impose liability only on those who specifically intend to pollute.

I. THERE IS A SUBSTANTIAL AND LONG-LASTING CIRCUIT SPLIT ON THE INTENT REQUIRED FOR CERCLA ARRANGER LIABILITY.

Celanese's petition established that there is a deep and abiding circuit split on whether arranger liability includes a specific intent requirement. Eby quibbles a bit on the margins, Br. at 9-10, but does not seriously dispute the existence of the split.

Instead, Eby speculates that those courts disavowing a specific intent requirement might revisit the issue in light of *Burlington Northern*. Br. at 9. There is no reason to expect this speculation will come to fruition. None of the cases rejecting specific intent involved the useful product issue. *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 679 n.6 (3rd Cir. 2003) (manufacturing process); *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1089 (8th Cir. 1995), *cert. denied*, 519 U.S. 808 (1996) (dump); *South Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996) (aerial spraying). Specific intent may be relevant to the distinction between a useful product and the disposal of hazardous waste. If arranger liability is to have any meaning, specific intent cannot be necessary in other contexts.

Eby's response to that distinction distorts Celanese's position. Celanese has not argued the "intention of a seller" matters only in useful product cases. Br. at 11. Celanese has argued that the **specific**

intent of the arranger is only relevant in that context. Specific intent is only one form of intent. Conscious disregard is another well-recognized form of intent. This Court has so held in other contexts; the lower federal courts have so held in the specific context of arranger liability. Eby has nothing to say about this argument other than a naked and unexplained assertion that it is a circular argument. Br. at 11.

Eby claims that the Court should await a "better developed record." Br. at 9. The instant record is as well developed as any future case could be. We know, because the District Court so found, that Eby's backhoe hit the Celanese pipeline; that the hit caused the spill; and that Celanese bore no responsibility whatever for the spill. We know, because the District Court so found, that Eby knew it had hit something, although it did not know what. We also know, because Eby's own employees so testified, that the industry custom is to investigate immediately when a backhoe strikes something while digging in a pipeline corridor. We know, because Eby did not know what it hit, that Eby cannot have conducted such an investigation.

Thus, the record directly refutes Eby's argument that the conscious disregard theory is "mere speculation." Br. at 12. How could Eby not have known what it hit unless it turned a blind eye? Eby never even tries to suggest an answer.

The record clearly establishes that Eby consciously disregarded the possibility that it had hit the Celanese pipeline and that Eby's conduct was the sole cause of the spill. If the Court agrees with Celanese that conscious disregard satisfies the intent element of arranger liability, at least outside the useful

product context, Celanese is entitled to judgment. The record in this case presents that question with crystal clarity.

II. THE SPECIFIC INTENT REQUIREMENT IS DIRECTLY CONTRARY TO THE PURPOSES OF ARRANGER LIABILITY.

Celanese's petition established the disastrous policy consequences of the Fifth Circuit's opinion. Requiring specific intent for arranger liability in all cases creates an enormous incentive for polluters to turn a blind eye to the environmental consequences of their conduct. It punishes responsible companies like Celanese and imposes unnecessary costs on taxpayers. The whole point of arranger liability is to prevent polluters from consciously disregarding the effects of what they have done.

Eby does not dispute that Congress intended arranger liability to prevent polluters from turning a blind eye. It does not dispute that the specific intent requirement would relieve polluters of arranger liability in a host of instances that Congress could not have intended.

Eby does argue that arranger liability is "fact intensive" and "case specific." Br. at 12. It claims that Celanese's hypotheticals arise "in a different context" but "sit comfortably within the *Burlington Northern* holding that arranger liability may not extend beyond" the statutory language. Br. at 13.

These arguments beg the question. Celanese has never suggested that arranger liability extends beyond the words of the statute, just that the statute does not require specific intent to pollute, at least outside the useful product context. One of the reasons that conscious disregard must be sufficient to

establish arranger liability outside the useful product context is that a contrary rule would immunize large numbers of polluters from liability, even though their conduct was the sole cause of the contamination.

"Examination of purpose is a staple of statutory interpretation." *McCreary County v. ACLU*, 545 U.S. 844, 861 (2005). Eby does not dispute that the purpose of CERCLA generally is to impose liability on those who contaminate the environment and that the purpose of arranger liability specifically is to prevent polluters from consciously disregarding the consequences of their actions. The Fifth Circuit's specific intent requirement is directly contrary to those purposes.

Eby does not dispute that, if it is not liable for the cleanup, no one is, leaving the taxpayers to pick up the tab. Eby claims that the District Court found that Celanese had waived any claim it was entitled to a third party defense. Br. at 13. What the District Court actually held was that it was "unmoved" by this argument because "[n]obody sued Celanese." App. 24a-25a.

Once again, this holding is directly contrary to the statutory purpose. CERCLA "encourages voluntary private action to remedy environmental hazards," thus furthering the goal of "responding to hazardous situations." *In re Dant & Russell, Inc.*, 951 F.2d 246, 248 (9th Cir. 1991). *Accord*, *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994) ("CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup"). The Fifth Circuit's holding creates a strong incentive to act in precisely the opposite fashion: delay and stonewall when there is a reasonable likelihood that someone else caused the environmental damage.

Eby's argument that the owner/operator liability provisions in CERCLA are adequate to ensure voluntary cleanups, Br. at 14, thus misses the mark. Neither the owner nor the operator is liable when the cause of the spill is the actions of a third party. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). In cases like this, when there is a reasonable likelihood that some third party caused the spill, the Fifth Circuit's opinion necessarily discourages a quick, voluntary cleanup.

The sole cause of this spill was the damage that Eby's backhoe did to the pipeline, combined with Eby's intentional failure to investigate what it knew it had hit. In every other context, conscious disregard of the consequences of one's action satisfies any general intent requirement that a statute may impose. There is no reason to adopt a different rule for arranger liability under CERCLA.

III. EBY'S WAIVER ARGUMENT DOES NOT PREVENT REVIEW OF THE PURELY LEGAL ISSUES PRESENTED BY THIS PETITION.

Celanese's position on the waiver issue is simple: if the Court agrees with Celanese on the meaning of "arrange" in CERCLA § 107(a), then the facts found by the District Court require the legal conclusion that Eby is an arranger. That Celanese attempted to prove more facts at trial, and failed, does not matter. Eby does not dispute that *Crofton Ventures L.P. v. G&H Partnership*, 258 F.3d 292 (4th Cir. 2001), squarely supports the latter proposition.

Instead, Eby argues that Celanese waived this purely legal issue of what conduct establishes arranger liability by not raising it until the Rule 59(e)

motion. Br. at 7. All of the cases that Eby cites, however, involve the submission of additional evidence after the court had ruled against the movant. Obviously, the efficient administration of justice requires parties to produce all of their evidence on summary judgment or trial.

The instant case does not involve new evidence. It involved a bench trial with each side free to offer all relevant evidence. The District Court entered complete findings of fact based on that record. Celanese's argument is that the facts found by the District Court require a judgment for Celanese, and that the District Court's contrary conclusion misunderstands the nature of arranger liability under CERCLA. A Rule 59(e) motion will lie when "the earlier ruling was premised upon a misunderstanding of a relevant regulatory scheme." *Atlantic States Legal Foundation v. Karg Bros.*, 841 F. Supp. 51, 55 (N.D.N.Y. 1993).

Because the issue is purely one of law, Celanese would not even have been required to present it to the District Court. *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994), is directly in point. At trial, Detrex conceded that it was an "owner" for purposes of CERCLA liability. On appeal, it argued that, as a matter of law, it was not a CERCLA owner. The Seventh Circuit reached the merits:

> The new ground is fully argued in the brief of the appellant, so that Elkhart had – and it took – a full opportunity to respond. The ground rests entirely on a pure issue of statutory interpretation . . . . The issue having been fully briefed and argued, there is no reason to defer its resolution

> to another case. There will be no better time to resolve the issue than now.

2 F.3d at 749-50. That is the instant case.

The Fifth Circuit's opinion works a complete injustice between the parties. The innocent pipeline owner and the taxpayers are stuck with the cost of cleaning up the mess that Eby made, and Eby is relieved of all liability. Had Eby acted responsibly, there would never have been a methanol spill and the cost of immediate repairs to the pipeline would have been a tiny fraction of the cost of remediation.

Still worse is the message that the Fifth Circuit has sent to other would-be polluters: close your eyes, ignore the facts, and you too will be able to avoid arranger liability. That message is utterly at odds with the purpose behind CERCLA. The fully developed factual record permits this Court to reverse that message and establish once and for all that specific intent has no place in arranger liability outside of the useful product context.

CONCLUSION

For these reasons, Celanese respectfully prays that the Court grant its petition for writ of certiorari to the Fifth Circuit.

Respectfully submitted,

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